United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

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Memorandum

To: Director, National Park Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Applicability of Wilderness Act provisions

This is in response to the memorandum of the Associate Director, Legislation, of November 15, 1974, seeking our opinion on whether the language customarily used in section 3 of the Service's proposed wilderness bills would make subsection 4(d)(1) of the Wilderness Act, 16 U.S.C. 1131, 1133 (d)(1) and/or other provisions of that Act applicable to wilderness areas designated by Congress within units of the National Park System.

The language customarily used in section 3 of the Service's recommended wilderness legislation reads:

> Sec. 3. The wilderness area designated by this Act shall be known as the . . . Wilderness Area and shall be administered by the Secretary of Interior in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness areas, and where appropriate any reference in that Act to the Secretary of Agriculture shall be deemed to be a reference to the Secretary of the Interior.

It is our opinion that an act containing this language causes Wilderness Act sections 4(c), 4(d)(1), 4(d)(6), 5(c), and 6(a) to be made applicable to the area designated as wilderness.

Subsections 4(d)(1), 4(d)(6), and 6(a) contain the phrase "wilderness areas designated by this Act"; subsection 4(c) contains the phrase "any wilderness areas designated by this Act"; and subsection 5(c) contains the phrase "any area designated by this Act as wilderness." (Emphasis added)

The Solicitor's Office originally emphasized the words, "by this Act," holding that for these provisions to be made applicable to any area designated as wilderness in the future, the legislation designating an area would have to provide specifically for such applicability. The Solicitor's position was that:

> . . .[O]nly those wilderness areas in national forests created by the Wilderness Act itself are affected by the provisions of sections 4(c) and (d) of the act which set out specific prohibitions or authorize the conduct of particular activities therein. 1/ These sections of the act would not apply to Interior areas which might in the future become wilderness areas. Thus, if Congress should in the future enact a law which merely designates particular Interior areas as "wilderness areas" and does nothing more, that law would not invoke the prohibitions specified in 4(c) nor bring into play the special provisions set out in 4(d) . . .*
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> 1/ Section 4(d)(2) may be an exception since, while it refers only to "national forest wilderness areas," it does not in terms limit the reference to national forest wilderness areas designated as such by the act. Compare secs. 4(c); 4(d)(1), (3), (4) and (6); 5(a) and (c); and 6. Sol. Op., Feb. 24, 1967, at 2 (emphasis added).

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*It is felt that the Opinion of the Solicitor may have read too much into the phrase "by this Act."

Sec. 4(d)(3) contains the phrase" . . . national forest lands designated by this Act as 'wilderness areas' . . ."

Sec. 4(d)(4) contains the phrase " . . . wilderness areas in the national forests designated by this Act. . ."

If the impact given to the phrase "by this Act" is correct, it would mean that the words "national forest" and "in the national forests" in 4(d)(3) and 4(d)(4), respectively, are mere surplusage. That this was not Congress's intent, is shown later in this memorandum. Nevertheless, the import put on the phrase, "by this Act," is pointed out here as it explains the Department of Interior's original comments to wilderness bills and the Congressional response to those comments.

The Solicitor's Opinion was reflected in the responses Department of Interior officials made to requests for comments on a series of bills which would have established areas under the Department's jurisdiction as wilderness areas. The responses contained a recommendation for an additional section 3, specifically including the prohibitions contained in sec. 4(c) of the Wilderness Act. In a letter of July 14, 1969, to Rep. Wayne N. Aspinall, Chairman of the House Committee on Interior and Insular Affairs, Secretary of the Interior Walter J. Hickel gave the following reason for the recommended addition:

> Although section 4(c) of the Wilderness Act of September 3, 1964, contains similar language, it was intended to and does apply to those Forest Service wilderness areas which were designated as wilderness on the day the Wilderness Act was approved. The new section 3 would provide similar restrictions for the wilderness areas established by H.R. 4275. H.R. Rep. No. 1441, 91st Cong., 2d Sess. 20 (1970).

On December 12, 1969, the Senate passed S. 3014 designating certain additional areas as wilderness areas. Section 2 of that bill contained the section 3 recommended then by Interior. On September 21, 1970, the House substituted an amended bill, H.R. 19007, which replaced the Interior recommended section with one which reads similarly to the language now customarily used in section 3 of the Service's draft wilderness legislation (supra at 1). When the amended bill was again before the Senate, Senator Henry Jackson explained its purpose shortly before passage. He said:

> Section 5 of S. 3014 as amended makes applicable to the national park system wilderness areas the provisions of the Wilderness Act governing areas designated by that act, as if such areas were designated upon the passage of the Wilderness Act of 1964. Thus, the prohibitions in certain provisions of the 1964 Wilderness Act on certain uses in wilderness areas are made applicable to the wilderness in these two park areas of the present bill. This does not apply, it should be pointed out, in other provisions of the 1964 act which specifically refer to "national forest wilderness areas." 116 Cong. Record S 17381, October 7, 1970 (daily edition).

The section 3 recommended by Interior Department officials at that time had the purpose of making only sec. 4(c) of Wilderness Act applicable

to any wilderness area designated by the legislation to which it was attached. In view of this legislative history the language now customarily used in section 3 of the Service's draft wilderness bills (which is a slight modification of the language about which Senator Jackson was speaking) increased the provisions of the Wilderness Act which become applicable to national park system wilderness areas designated by subsequent legislation.

Subsection 4(c) of the Wilderness Act contains no reference to the Secretary of Agriculture. Section 3 of the Service's draft wilderness bills reads: ". . . where appropriate any reference in [the Wilderness] Act to the Secretary of Agriculture shall be deemed to be a reference to the Secretary of the Interior." If the intent was to make only subsection 4(c) of the Wilderness Act applicable to wilderness areas designated by subsequent legislation, this clause would be superfluous. However, there are three sections of the Wilderness Act which do refer specifically to the Secretary of Agriculture and where it is appropriate to have that reference deemed to be a reference to the Secretary of the Interior. These are sections 4(d)(1), 5(c), and 6(a).

Furthermore, Senator Jackson pointed out that the model for section 3 of the Service's draft wilderness bills does not make applicable "other provisions of the 1964 act which specifically refer to 'national forest wilderness areas.'" By intending to make the provisions of the Wilderness Act which refer to "national forest wilderness areas" (e.g., 4(d)(2), (3) and (4)) inapplicable, Congress showed its intention to make applicable those provisions which pertain to "wilderness areas" not modified by the phrase "national forest" (e.g., 4(c), 4(d)(1), 4(d)(6), 5(c) and 6(a)).

As the question regarding the applicability of provisions of the Wilderness Act arose in the context of the applicability of subsection 4(d)(1), it is deemed useful to trace the legislative history of that section in order to show that it was the intention of Congress that it apply to wilderness areas in the national park system.

Subsection 4(d)(1) reads:

> Within wilderness areas designated by this Act the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable . . .

A forerunner of subsection 4(d)(1) read:

> Within national forest areas included in the wilderness system the use of aircraft or motorboats where these practices have already become well established may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable . . .

S. 174, 87th Cong., 1st Sess. § 6(c)(1) (1961) (emphasis added).

The phrase "national forest areas included in" was deleted as part of an amendment introduced by Senator Frank Church, the floor manager of the Wilderness bill at that time. He gave the following explanation for the proposed amendment which was subsequently agreed to:

> . . . [T]here is no reason to confine the stated exception to wilderness areas which are carved out of national forests.
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> . . . There is no reason why the stated exception should not extend to wilderness areas in national parks as well as to wilderness areas carved out of the national forests.
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> . . . The effect of the amendment is to extend . . . an exception to the general rule to all of the wilderness areas equally, rather than to confine it to the wilderness areas carved out of national forests. 107 Cong. Record 18103, September 5, 1961 (bound edition).

If the phrase "national forest areas included in" had not been deleted by Senator Church's amendment, subsection 4(d)(1) would not apply to national park system wilderness areas in light of Senator Jackson's statement that provisions of the Wilderness Act which "specifically refer to 'national forest wilderness areas'" are not made applicable by the precursor of section 3 of the Service's draft wilderness legislation. Senator Church's explanation of his amendment, however, shows that subsection 4(d)(1) was intended to apply to those areas.

More recently Senator Church referred to his amendment and his explanation in order to reaffirm the applicability of subsection 4(d)(1) to wilderness areas in the national park system. He said:

> . . . I offered an amendment to make it clear that the use of motorboats or the landing of aircraft, where previously established, could continue within national park wilderness, as well as within national forest wilderness . . . and that clarifying amendment passed the Senate by a voice vote. Yet I understand the Park Service . . . does not intend to recommend the surface of Crater Lake or of Yellowstone Lake as wilderness. These exclusions are not mandated, in any sense, by the Congress. Hearing on S. 2453 Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess., at 58-59 (1972). (Emphasis added)

This does not mean that previously established motorboat and aircraft uses of an areas must be allowed to continue upon the designation of that area as a wilderness or that water areas must be excluded from wilderness recommendation where motorboats are involved. The authority to allow such continued use is discretionary and may be withheld. United States v. Gregg. 290 F. Supp. 706 (W.D. Wash. 1968). Similarly, discretion may be exercised in the wilderness legislative recommendations.

It is apparent that at the present time the Department does not intend to allow the continued use of motorboats and aircraft in areas under its jurisdiction upon their designation as wilderness areas. See Memorandum of June 24, 1972, from the Assistant Secretary for Fish and Wildlife and Parks to the Directors of the Bureau of Sport Fisheries and Wildlife and the National Park Service. See also Memorandum of October 2, 1974, from the Associate Director, Legislation, to Regional Director, Rocky Mountain Region.

It is noted in passing that the present motorboat use on Crater Lake consists of "four, concessioner operated sixty passenger motorcraft." Letter of August 5, 1974, from Associate Director, Legislation, to Douglas W. Scott, Northwest Representative, Sierra Club, at 2. Subsection 4(c) of the Wilderness Act reads:

> Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise . . . within any wilderness area designated by this Act . . . (emphasis added).

Motorboats operated by concessioners most likely come within the term "commercial enterprise." The rights of a concessioner under its contract with the Park Service are "private rights." Should the surface of Crater Lake be designated a wilderness area, the Park Service would be mandated to allow the motorboat concession to continue its use of the lake subject to the terms of the contract without any reference to subsection 4(d)(1) of the Act. Of course, when the contract expires, the level of established use may be allowed to continue by means of the exception provided by subsection 4(d)(1) should the Secretary in his discretion deem it desirable.

Furthermore, it is arguable that such use or even an increased level of or different form of motorboat use is allowable without resort to subsection 4(d)(1) under subsections 4(c) or 4(d)(6).

Subsection 4(c) reads:

> . . . [E]xcept as necessary to meet minimum requirements for the administration of the area for the purpose of this Act . . ., there shall be no . . . use of . . . motorboats . . . within any such area.

It may be maintained that in order "to meet minimum requirements for the administration of the [lake] for the purpose of this Act" some level or form of motorboat use is "necessary."

Subsection 4(d)(6) reads:

> Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational . . . purposes of the areas.

It may be maintained that the performance of some level of concessioner tours (undoubtedly "commercial services") is a proper activity which is "necessary" to realize "the recreational . . . purposes of the [lake]."

Notwithstanding these arguments the Service should be aware that, if the courts should determine that subsection 4(d)(1) is controlling, then an increase in motorboat use would not be authorized under the act. The act speaks only in terms of "established" uses. Accordingly, administrative options and discretion over the appropriate management of the water surface could be lost if the lake is designated wilderness. Specifically, the Service could be precluded from increasing the level of motorboat use.